

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 1784

SPONSOR: Health, Aging, and Long-Term Care Committee and Senator Fasano

SUBJECT: Public Records

DATE: April 8, 2003

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Munroe</u>	<u>Wilson</u>	<u>HC</u>	<u>Favorable/CS</u>
2.	<u>                    </u>	<u>                    </u>	<u>CF</u>	<u>                    </u>
3.	<u>                    </u>	<u>                    </u>	<u>CJ</u>	<u>                    </u>
4.	<u>                    </u>	<u>                    </u>	<u>GO</u>	<u>                    </u>
5.	<u>                    </u>	<u>                    </u>	<u>RC</u>	<u>                    </u>
6.	<u>                    </u>	<u>                    </u>	<u>                    </u>	<u>                    </u>

## I. Summary:

The bill makes all information and records reported under s. 893.055, F.S., which would identify a patient, confidential and exempt from the requirements of the Public Records Law. Committee Substitute for Senate Bill 2390 creates s. 893.055, F.S., to provide for the prescription monitoring program for certain controlled substances. The bill provides a statement of public necessity for the public records exemption. The bill specifies requirements and procedures for a patient's written consent for disclosures that involve medical treatment to be provided to the patient and guidelines for the use of such information by criminal justice agencies.

This bill creates two undesignated sections of law.

## II. Present Situation:

### Public Records Law

The Public Records Law, ch. 119, F.S., and the Public Meetings Law, s. 286.011, F.S., specify the conditions under which public access must be provided to governmental records and meetings of the executive branch and other governmental agencies. While the state constitution provides that records and meetings of public bodies are to be open to the public, it also provides that the Legislature may create exemptions to these requirements by general law if a public need exists and certain procedural requirements are met. Article I, s. 24, Florida Constitution, governs the creation and expansion of exemptions, to provide, in effect, that any legislation that creates a new exemption or that substantially amends an existing exemption must also contain a statement of the public necessity that justifies the exemption. Article I, s. 24, Florida Constitution, provides that any bill that contains an exemption may not contain other substantive provisions, although it may contain multiple exemptions.

## **Ownership and Control of Patient Records**

Subsection (4) of section 456.057, F.S., requires health care practitioners licensed by the Department of Health who generate a medical record after making a physical or mental examination of, or administering treatment or dispensing legend drugs to, any person, upon request, to furnish, in a timely manner, to that person or that person's legal representative, without delays for legal review, a copy of all reports and records relating to that examination or treatment, including X-rays and insurance information. When a patient's psychiatric, psychological or psychotherapeutic records are requested by the patient or the patient's legal representative, the health care practitioner may provide a report in lieu of copies of the record. The furnishing of such report or copies may not be conditioned upon payment of a fee for services rendered.

Except as provided in s. 456.057, F.S., patient records may not be furnished to, and the medical condition of a patient may not be discussed with, any person other than the patient or the patient's legal representative or other health care practitioners and providers involved in the care or treatment of the patient, except upon written authorization of the patient. Such records may be disclosed: to any person, firm or corporation that has procured or furnished such examination or treatment with the patient's consent; when compulsory physical examination is made pursuant to Rule 1.360, Florida Rules of Civil Procedure, in which case copies of the medical records shall be furnished to both the defendant and the plaintiff; in any civil or administrative action, unless otherwise prohibited by law, upon the issuance of a subpoena from a court of competent jurisdiction and proper notice to the patient or the patient's legal representative by the party seeking the records; or for statistical and scientific research, if the information is abstracted to protect the patient's identity or if written permission is received from the patient or the patient's legal representative.

Section 456.001, F.S., defines a health care practitioner as any person licensed under any of the following chapters of the Florida Statutes: ch. 457 (acupuncturists), ch. 458 (medical physicians), ch. 459 (osteopathic physicians), ch. 460 (chiropractic physicians), ch. 461 (podiatric physicians), ch. 462 (naturopaths), ch. 463 (optometrists), ch. 464 (nurses), ch. 465 (pharmacists), ch. 466 (dentists), ch. 467 (midwives), ch. 468 (audiologists, speech-language pathologists, nursing home administrators, occupational therapists, respiratory therapists, dietitians/nutritionists, athletic trainers, orthotists, pedorthists, prosthetists), ch. 478 (electrologists), ch. 480 (massage therapists), ch. 483 (clinical laboratory personnel and medical physicists), ch. 484 (opticians and hearing aid specialists), ch. 486 (physical therapists), ch. 490 (psychologists), and ch. 491 (clinical social workers, marriage and family therapists, and mental health counselors).

As used in s. 456.057, F.S., "records owner" is defined to mean any health care practitioner who generates a medical record after making a physical or mental examination of, or administering treatment or dispensing legend drugs to, any person; any health care practitioner to whom records are transferred by a previous records owner; or to any health care practitioner's employer, if the contract or agreement between the employer and the health care practitioner designates the employer as the records owner. The following persons or entities are not authorized to acquire or own medical records, but are authorized under the confidentiality and disclosure requirements of s. 456.057, F.S., to maintain those documents required by regulations

under which they are regulated: certified nursing assistants, *pharmacists and pharmacies*, nursing home administrators, respiratory therapists, athletic trainers, electrologists, clinical laboratory personnel, medical physicists, opticians and optical establishments, persons or entities making physical examinations for an injured person as part of personal injury protection claim, or hospitals and ambulatory surgical centers.

Licensed health care practitioners who violate the requirements of s. 456.057, F.S., are subject to discipline by the appropriate licensing authority. The Attorney General is authorized to enforce the provisions of s. 456.057, F.S., against any record owner who is not otherwise licensed in Florida, through injunctive relief and fines not to exceed \$5,000 per violation.

Chapter 465, F.S., provides for the regulation of pharmacy. Section 465.017(2), F.S., specifies that except as permitted by law, specifically: ch. 465, F.S., relating to pharmacy; ch. 406, F.S., relating to the Medical Examiners Act; ch. 409, F.S., relating to the Medicaid program; ch. 456, F.S., relating to the general regulatory provisions for professions; ch. 499, F.S., relating to drugs, devices and household products; and ch. 893, F.S., relating to controlled substances, records maintained in a pharmacy relating to the filling of prescriptions and the dispensing of medicinal drugs may not be furnished to any person other than to the patient for whom the drugs were dispensed, or his or her legal representative, or to the Department of Health pursuant to existing law, or, in the event that the patient is incapacitated or unable to request the records, his or her spouse, except upon written authorization of such patient. Section 465.017(2), F.S., also provides that the records may be furnished in any civil or criminal proceeding upon the issuance of a subpoena from a court of competent jurisdiction and proper notice to the patient or his or her legal representative by the party seeking such records.

### **Controlled Substances**

Chapter 893, F.S., sets forth the Florida Comprehensive Drug Abuse Prevention and Control Act. The chapter classifies controlled substances into five schedules in order to regulate the manufacture, distribution, preparation, and dispensing of the substances. Substances in Schedule I have a high potential for abuse and have no currently accepted medical use in the United States. Schedule II drugs have a high potential for abuse and a severely restricted medical use. Cocaine and morphine are examples of Schedule II drugs. Schedule III controlled substances have less potential for abuse than Schedule I or Schedule II substances and have some accepted medical use. Substances listed in Schedule III include anabolic steroids, codeine, and derivatives of barbituric acid. Schedule IV and Schedule V substances have a low potential for abuse, compared to substances in Schedules I, II, and III, and currently have accepted medical use. Substances in Schedule IV include phenobarbital, librium, and valium. Substances in Schedule V include certain stimulants and narcotic compounds. The chapter defines practitioner to mean a licensed medical physician, a licensed dentist, a licensed veterinarian, a licensed osteopathic physician, a licensed naturopathic physician, or a podiatrist, if such practitioner holds a valid federal controlled substance registry number. The chapter provides that every record required by the chapter, including prescription records be kept and made available for at least two years for inspection and copying by law enforcement officers whose duty it is to enforce the

laws of the state relating to controlled substances.<sup>1</sup>

### **Health Insurance Portability and Accountability Act of 1996**

On December 20, 2000, President Clinton issued landmark rules to protect the privacy of peoples' medical records. The 1996 Health Insurance Portability and Accountability Act (HIPAA)<sup>2</sup> required the Administration to issue regulations protecting the privacy of health information. The United States Department of Health and Human Services issued Standards for Privacy of Individually Identifiable Health Information on December 28, 2000, which were originally scheduled to go into effect on February 26, 2001. The effective date for the regulations was delayed and will take effect on April 14, 2003. The regulations only apply to health plans, health care clearinghouses and certain health care providers. The regulations permit states to afford greater privacy protections to health information.<sup>3</sup> Exceptions for state law are provided for public health (authority, power, or procedures established under any law providing for the reporting of disease or injury, child abuse, birth, or death, public health surveillance, or public health investigation or intervention) and state regulatory reporting (the ability of a state to require a health plan to report, or to provided access to, information for management audits, financial audits, program monitoring and evaluation, facility licensure or certification, or individual licensure or certification).<sup>4</sup>

### **III. Effect of Proposed Changes:**

The bill makes all information and records reported under s. 893.055, F.S., which would identify a patient, confidential and exempt from the requirements of the Public Records Law. Committee Substitute for Senate Bill 2390 creates s. 893.055, F.S., to provide for the prescription monitoring program for certain controlled substances. The bill authorizes the Department of Health to disclose a patient's identity, whose identity is otherwise confidential and exempt from the Public Records Law, to:

- A practitioner defined under ch. 893, F.S., who requests information and certifies that the information is necessary to provide medical treatment in accordance with s. 893.05, F.S., to a current patient, subject to the patient's written consent.<sup>5</sup> The practitioner may designate one person in his or her office to access the information and records reported

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<sup>1</sup> The Second District Court of Appeal upheld a warrantless search and seizure of prescription records pursuant to s. 893.07, F.S. *Gettel v. State* 449 So.2d 413 (2<sup>nd</sup> DCA 1984).

<sup>2</sup> Section 262 of the Health Insurance Portability and Accountability Act of 1996, Public Law 104-191, enacted on August 21, 1996, directed the United States Department of Health and Human Services to develop standards to protect the security, including the confidentiality and integrity, of health information.

<sup>3</sup> Sections 160.201, 160.203, 160.204, and 160.205, C.F.R.

<sup>4</sup> The federal Health Insurance Portability and Accountability Act of 1996 (HIPAA) generally preempts state health information privacy laws, unless they provide a higher level of protection than the act. (Pub. L. No.104-191, §262, 110 Stat. 1936, 2029.) However, these state privacy provisions may not be preempted if the Secretary of Health and Human Services determines that the state law has as its principal purpose the regulation of the manufacture, registration, distribution, dispensing, or other control of any controlled substances (as defined in 21 U.S.C. §802), or that is deemed a controlled substance by state law. (45 C.F.R. §160.203 (a)(2)). See also, 42 U.S.C.A. § 1320d-7.

<sup>5</sup> Section 893.05, F.S., allows a practitioner, in good faith and in the course of his or her professional practice only to prescribe, administer, dispense, mix, or otherwise prepare a controlled substance, or the practitioner may direct the administration of a controlled substance by a licensed nurse or an intern practitioner under his or her direction and supervision.

- under the electronic prescription monitoring system, and provide information to the practitioner as directed, subject to the patient's written consent.
- A Florida-licensed pharmacist who requests information and certifies that the requested information is to be used to dispense controlled substances in accordance with s. 893.04, F.S., to a current patient, subject to the patient's written consent.<sup>6</sup>
  - A criminal justice agency defined under s. 119.011, F.S., which enforces the laws of Florida or the United States relating to drugs and which is engaged in a specific investigation involving a violation of law.<sup>7</sup> Any member of a criminal justice agency receiving information as authorized in this section shall avoid unauthorized use or dissemination of that information. Such member receiving the information may disclose its contents to other persons to the extent that such disclosure is appropriate to the proper performance of the official duties of the member making or the person receiving the disclosure.
  - An employee or agent of the Department of Health who is involved in a specific investigation involving a violation of the chapter regulating the alleged violator, the rules of the Department of Health, or the rules of a board regulating the alleged violator.
  - An employee of the Agency for Health Care Administration who is involved in an investigation of Medicaid fraud and abuse.
  - The patient, for purposes of checking the information for accuracy and reporting any inaccuracies to the Department of Health for correction. A patient may make a written request to the Department of Health for any record contained in the electronic prescription monitoring system relating to that patient upon verifying his or her identity in accordance with applicable state or federal law. A fee for such copy may be assessed in accordance with the Public Records Law.

The bill prohibits any person who obtains information under this section from using the information to his or her own personal advantage or revealing any information obtained except in a prosecution or administrative hearing for a violation of federal or state law, or if applicable to provide medical treatment or dispense controlled substances to a current patient, or to the patient to verify the accuracy of the information. A person who knowingly violates the restrictions on the use of information about the patient's identity commits a felony of the third degree, punishable as provided in s. 775.082 or s. 775.083, F.S. The bill requires a practitioner, pharmacist, or other person or agency that obtains this confidential or exempt information to maintain the confidentiality of that information.

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<sup>6</sup> Section 893.04, F.S., authorizes a pharmacist, in good faith and in the course of professional practice only to dispense controlled substances upon a written or oral prescription under specified conditions.

<sup>7</sup> Section 119.011, F.S., defines criminal justice agency to mean any law enforcement agency, court, or prosecutor and includes any other agency charged by law with criminal law enforcement duties, or any agency having custody of criminal intelligence or investigative information for assisting in the conduct of active criminal investigation or prosecution. The term also includes the Department of Corrections.

The bill provides the required legislative findings of the public necessity for the creation of the public records law exemption and makes the exemption subject to a future review and repeal on October 1, 2008, in accordance with the Open Government Sunset Review Act of 1995.

The bill provides a contingent effective date of July 1, 2004, if Senate Bill 2390 or similar legislation establishing an electronic system to monitor the prescribing of controlled substances, is adopted in the same legislative session or an extension thereof and becomes law.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, s. 18 of the Florida Constitution.

##### **B. Public Records/Open Meetings Issues:**

The bill makes all information and records reported under s. 893.055, F.S., which would identify a patient, confidential and exempt from the requirements of the Public Records Law. Committee Substitute for Senate Bill 2390 creates s. 893.055, F.S., which provides for the prescription monitoring program for certain controlled substances. The bill provides a statement of public necessity for the public records exemption.

The public records exemption for a patient's identity in all information and records reported to the Department of Health pursuant to the electronic system for monitoring the prescribing of controlled substances and takes effect on July 1, 2004, if SB 2390 or similar legislation establishing an electronic system to monitor the prescribing of controlled substances, is adopted in the same legislative session or an extension thereof and becomes law. By implication, the intended custodian is the Department of Health which must establish the electronic system for monitoring the prescribing of controlled substances. The Department of Health will not possess the records covered by the public records exemption until after the exemption has been created, therefore, there is no need for the Legislature to clarify that the public records exemption should apply retroactively to such records.<sup>8</sup>

##### **C. Trust Funds Restrictions:**

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

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<sup>8</sup> The Florida Supreme Court has opined that the access to public records is a substantive right and has held that a statute affecting that right is presumptively prospective and there must be a clear legislative intent for the statute to apply retroactively. *Memorial Hospital-West Volusia, Inc., v. News-Journal Corp.* 784 So.2d 438 (Fla. 2001). In that case, the court held that a statute providing an exemption for public records and meetings of private corporations leasing hospitals from public taxing authorities did not apply to records created and meetings held prior to the effective date of the statute. *Id.*

**V. Economic Impact and Fiscal Note:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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